

Comment Letter COT



CITY OF TRACY

City Attorney
325 East Tenth Street
Tracy, CA 95376

FEB 22 2006 000217

COT

E-Mail Address: attorney@ci.tracy.ca.us
Telephone: (209) 831-4050
Fax: (209) 831-4153

February 7, 2006

Sent electronically (with enclosures) to sdip_comments@water.ca.gov

Originals by Overnight Mail to:

Paul A. Marshall
California Department of Water Resources
South Delta Branch
1416 Ninth Street
Sacramento, CA 95814

Sharon McHale
U.S. Bureau of Reclamation
Mid-Pacific Region
2800 Cottage Way
Sacramento, CA 95825

Re: Comments on Draft EIS/EIR, South Delta Improvements Program

Dear Mr. Marshall and Ms. McHale:

This letter provides the City of Tracy's (the "City" or "Tracy") comments on the Department of Water Resources ("DWR") and Bureau of Reclamation's ("Bureau") Draft Environmental Impact Statement/Environmental Impact Report ("Draft EIS/EIR") for the South Delta Improvement Program ("SDIP").

As described below, the Draft EIS/EIR, as currently proposed, violates the California Environmental Quality Act (Pub. Res. Code §§ 21000) ("CEQA") because the document:

- (1) Fails to provide an environmental setting adequate to allow decision-makers and the public to evaluate the SDIP's environmental effects;
- (2) Conceals the SDIP's impacts by manipulating the baseline to include temporary changes to the physical environment;
- (3) Fails to disclose the project-specific incremental impacts of shifting from temporary to permanent barriers;
- (4) Conceals the SDIP's impacts by failing to analyze the combined impacts of all sources of cumulative impacts;
- (5) Relies upon a "No Action" Alternative that does not include reasonably foreseeable future conditions; and

Comments on Draft EIS/EIR
South Delta Improvements Program
February 7, 2006
Page 2 of 8

FEB 22 2006

000217

- (6) Fails to propose all feasible mitigation measures and alternatives necessary to reduce the SDIP's potentially adverse environmental impacts to less than significant levels.

I. *Background*

Tracy has a population of 80,000 and is located within the legal boundary of the South Delta. The Tracy Waste Water Treatment Plant ("WWTP") was constructed in 1930. The WWTP's discharge to Old River is located between the temporary barriers in Old River, approximately 3 miles downstream from the barrier at the head of Old River. Approved in the 1980s to discharge an average dry weather flow ("ADWF") of 9 million gallons per day of effluent, on October 15, 2002 the City certified an environmental impact report for an expansion to 16 million gallons per day ADWF, as well as the addition of significant treatment improvements, including nitrification, denitrification, and filtration. The City has since undertaken other actions to carry out the construction of the expansion and advanced treatment facilities, including awarding the construction contract for the project on June 15, 2004. Construction is underway.

In 1991, DWR and the Bureau began an experimental project placing temporary barriers at the confluence of Old River and the San Joaquin River and in other locations in the South Delta. Those barriers have impacted: (1) the water quality in the vicinity of the WWTP discharge point; and (2) the ability of the WWTP to function within the regulatory requirements to which it is subject. In short, the barriers cause decreased flows in Old River, affecting water quality and significantly restricting dilution of the WWTP's effluent. More specifically, the barriers affect water quality criteria in Old River, including temperature, dissolved oxygen, and electrical conductivity, and prevent necessary levels of dilution for the effluent from the WWTP.

A. *DWR Has Provided No Meaningful Response to the City's Repeated Efforts to Initiate a Dialogue Regarding the Barriers' Impacts Upon the South Delta Aquatic Environment and the WWTP*

COT-1

The City has repeatedly voiced its concerns to DWR about the barriers' impacts upon the environment and the WWTP to no avail. For example:

- (1) In a February 14, 1996 letter from Steven Bayley of the City of Tracy to the United States Army Corps of Engineers, the City stated that the environmental documents for the temporary barriers project did not accurately reflect the barriers' impact upon the water available for dilution of the City's wastewater discharge in Old River;
- (2) In another letter sent on December 3, 1996 letter from Steven Bayley to Stephen Roberts of DWR, the City described the temporary barriers' environmental impacts, including the fact that the dissolved oxygen content of Old River was below the applicable water quality objective of 5.0 parts per million when the temporary barriers were in place;
- (3) In a subsequent October 15, 2002 letter from Steven Bayley to Paul Marshall of DWR, the City requested that the Draft EIS/EIR evaluate the SDIP's impacts upon a baseline that did not assume temporary barriers to be permanent; and
- (4) In a November 12, 2002 letter from Steven Bayley to Paul Marshall, the City reiterated its description of the impacts and requested that the Draft EIS/EIR evaluate an

Comments on Draft EIS/EIR
South Delta Improvements Program
February 7, 2006
Page 3 of 8

FEB 22 2006

000217

alternative that pumps water from the San Joaquin River into Old River to improve dilution.

COT-1

DWR's only substantive response to Tracy's concerns was made in 1996, when DWR stated that the barriers would actually assist the dispersal of the City of Tracy's wastewater discharge. (See April 11, 1996 letter from Kathlin Johnson to Tom Coe.) DWR has provided no concrete evidence that the barriers provide this dispersion assistance, and as discussed below, no such evidence is set forth in the Draft EIS/EIR.

B. *Despite DWR's Unwillingness to Engage in a Dialogue With Tracy Regarding the Barriers' Impacts, DWR Concedes That These Impacts Exist*

COT-2

While DWR has provided no meaningful response to the City's continued expressions of concern, DWR is clearly aware of these problems, as is evidenced by DWR raising these issues in comments upon the City's WWTP Expansion. Thus, in a February 8, 2000 letter from Daniel Peterson of DWR to Robert Conant of the City of Tracy, DWR stated that modeling showed Old River flows at a stand still or slightly reversed when barriers were in place and that these low flow and stagnant periods might seriously impair the Old River's dilution capacity. Nonetheless, DWR ignores these issues in its environmental documents and remains silent when the same issues are raised with respect to DWR's projects.

DWR's unwillingness to address the City's concerns has resulted in a Draft EIS/EIR that, as set forth below, violates multiple provisions of CEQA. The Draft EIS/EIR must be revised and recirculated to correct fundamental inadequacies in its environmental setting, baseline, project specific impacts, cumulative impacts, "No Action" alternative, and mitigation measures analyses.

II. Discussion

A. *The Draft EIS/EIR's Environmental Setting Discussion Ignores the City's WWTP and Therefore Fails to Comply with CEQA*

COT-3

The environmental setting in the Draft EIS/EIR largely omits discussion of the City's WWTP and therefore precludes the public from fully understanding the SDIP's impacts upon water quality and the WWTP. In *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal.App.4th 713 (1994), the appeals court found that an EIR's environmental setting discussion was inadequate under CEQA where the EIR failed to identify areas across a river from the proposed project site, which areas included a wildlife preserve that would be affected by the project. (See *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal.App.4th 713, 710 (1994).) The court found that although the EIR stated generally that the project was located in a region with wetland habitats, the failure to specifically identify the location and extent of those habitats deprived the reader of adequate information to understand "the environmental effects they may suffer as a result of construction of the development project." (*Id.*) As a result, the court found the environmental setting's omission of such information invalid under CEQA.

The Draft EIS/EIR similarly provides no discussion of the Tracy WWTP's discharge location or imminent expansion to 16 million gallons per day, thereby making it impossible for the reader to understand the environmental effects of the SDIP on the water quality in the WWTP's vicinity. In *San Joaquin Raptor*, the lead agency at least justified the EIR's omission by stating that two

Comments on Draft EIS/EIR
South Delta Improvements Program
February 7, 2006
Page 4 of 8

000217
FEB 22 2006

biological consulting firms had evaluated the project and that an independent investigation had verified the lack of wetlands. (*See id.* at 726 n.5.) DWR provides no such evidence in the Draft EIS/EIR to explain the absence of any discussion of the WWTP's expansion. While foreseeing the unforeseeable is not possible, CEQA requires DWR to "use its best efforts to find out and disclose all that it reasonably can." (14 C.C.R. §15144.) Here, the location of the WWTP and its approved expansion from 9 million gallons per day to 16 million gallons per day of effluent was acknowledged in the DWR letter of February 8, 2000, is clearly foreseeable, was commented on by DWR during the EIR process for the City's WWTP, and should have been discussed and analyzed fully in the Draft EIS/EIR.

COT-3

B. *The Draft EIS/EIR Conceals Impacts by Relying Upon the Conditions With the Temporary Barriers as the Baseline for Determining Impacts*

Despite the fact that the Temporary Barrier Program was put into effect as a *temporary* experimental project with no comprehensive CEQA review, the Draft EIS/EIR treats the temporary barriers as permanent. The CEQA Guidelines recognize that the actual setting at the time the Notice of Preparation is published will not always be the baseline for purposes of evaluating impacts. The CEQA Guidelines state that "[t]he environmental setting will *normally* constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (14 C.C.R. §15125. *See also* Resources Agency Discussion following 14 C.C.R. §15125 (reiterating that the environmental setting *normally* constitutes the baseline conditions).)

COT-4

Moreover, courts have repeatedly found circumstances in which CEQA obligated the lead agency to consider other factors in determining the baseline. The underlying principle is that the appropriate baseline is that which ensures "meaningful assessment of the environmental impacts of the proposed project." (*Save Our Peninsula Committee v. Monterey County*, 87 Cal.App.4th 99, 119 (2001).) Thus, in *Save Our Peninsula*, the court found that CEQA required the preparers of the EIR to evaluate historical water usage to support the selected baseline and to assure that the public was not manipulated by a baseline that relied upon temporary conditions. (*Save Our Peninsula Committee v. Monterey County*, 87 Cal.App.4th 99, 122 (2001).) Similarly, in *County of Amador v. El Dorado County Water Agency*, 76 Cal.App.4th 944 (1999), the court found that the EIR's discussion of water levels represented an inadequate baseline absent any discussion of the historical duration and timing of releases. (*County of Amador v. El Dorado County Water Agency*, 76 Cal.App.4th 944, 124 (1999).) Additionally, in *Fairview Neighbors v. County of Ventura*, 70 Cal.App.4th 238 (1999), the court upheld the lead agency's decision not to rely upon actual traffic counts where such counts failed to reflect an accurate historical perspective. (*Fairview Neighbors v. County of Ventura*, 70 Cal.App.4th 238, 243 (1999).)

By failing to address the fact that the temporary barriers were indeed intended to be *temporary*, the Draft EIS/EIR fails to provide the accurate historical perspective necessary for a meaningful analysis of the SDIP's impacts. The Draft EIS/EIR provides no analysis of the impacts that the SDIP would cause to an environment in which the temporary barriers are discontinued. The record is clear that the temporary barriers were approved in 1991 merely for a temporary five-year test period. (*See, e.g.*, United States Army Corps of Engineers, Public Notice Number 199600027 (January 31, 1996) (attached hereto as **Exhibit A**).) In fact, because the approval was for a finite period of time, DWR affirmatively applied for authorization to continue the barriers beyond 1996. (*See id.*; *see also* Biological Assessment for the South Delta Temporary

Comments on Draft EIS/EIR
South Delta Improvements Program
February 7, 2006
Page 5 of 8

FEB 22 2006

000217

Barriers Project 1996 at vii, 1-2, 2-1 (December 1995) (attached hereto as **Exhibit B**) (proposing the extension of the temporary five-year study interval); Draft Environmental Impact Report/Environmental Impact Statement Interim South Delta Program (ISDP) Volume I (1996) at 1-4 to 1-5 (attached hereto as **Exhibit C**) (characterizing the barriers as "temporary"); Comprehensive Monitoring Report for the Proposed Test Program Temporary Barriers Project (1995) at xi, xiv, 1-1, 1-7 (attached hereto as **Exhibit D**) (also referring to the temporary nature of the barriers installed in 1991).)

COT-4

Removal or modification of the barriers is not merely a theoretical possibility. As set forth in the Initial Study Proposed Test Program Temporary Barriers Project (1995) by DWR itself, the *temporary barriers would be removed*, replaced, or modified, if they were shown to have significant negative impacts that could not be mitigated. (See Initial Study Proposed Test Program Temporary Barriers Project (1995) at 5 (attached hereto as **Exhibit E**).) There is ample evidence that the temporary barriers *do* cause such impacts and, therefore, must be removed, replaced, or modified pursuant to DWR's own commitment. The City has conducted modeling that definitively shows that the temporary barriers reduce flow in Old River, detrimentally affecting water quality and precluding adequate and reliable dilution of the WWTP's effluent. (See Availability of Adequate Flow in Old River for City of Tracy WWTP Discharge – Preliminary Observations from the SDIP DEIS/EIR, DSM2 Results ("Preliminary Modeling") (attached hereto as **Exhibit F**).) As a result, under the DWR's own criteria, these impacts must be mitigated or the temporary barriers must be *removed*, replaced, or modified.

Correcting the baseline to recognize the temporary nature of the barriers is particularly important given that no comprehensive CEQA review was performed prior to DWR's approval of their placement. By failing to recognize that the temporary barriers were in fact temporary, the Draft EIS/EIR allows the real world impacts of approving permanent barriers to escape review under CEQA.

C. *The Draft EIS/EIR Does Not Correctly Identify the Incremental Impact of Shifting from Temporary Barriers to the SDIP*

Setting aside the baseline issue, the Draft EIS/EIR fails to analyze the incremental impact of switching from the temporary barriers to the permanent barrier technology proposed in the SDIP. Although the temporary barriers significantly affected water quality in the vicinity of the WWTP, those barriers at least provided some leakage of water into Old River. The SDIP would reduce this leakage, thereby further reducing flows in Old River below the current levels occurring with the temporary barriers. As a result, the Draft EIS/EIR dramatically understates the SDIP's impacts on water quality and dilution in Old River.

COT-5

Given the Draft EIS/EIR's omission of the requisite impacts analysis, the City has conducted this analysis at its own expense. The Preliminary Modeling definitively concludes that the SDIP's incremental impact is significant. For example, the Draft EIS/EIR fails to discuss the potential impacts of the complete closure of the fish gate at the Head of Old River on the flows at the Tracy WWTP discharge location. (See Draft EIS/EIR at 5.2-22 – 5.2-23.) Page 5.2-48 of the Draft EIS/EIR incorrectly concludes that the changes in tidal flow at the head of Old River are considered beneficial and that no mitigation is required. This incorrect conclusion is restated on pages 5.2-52, 57, 60, 63, and 65 for the other alternatives that include the complete closure of the fish gate in April and May.

Comments on Draft EIS/EIR
South Delta Improvements Program
February 7, 2006
Page 6 of 8

FEB 22 2006 000217

In fact, the SDIP will cause flows in Old River to be inadequate for dilution for an approximately 60-day period every year. Figure 1 of the Preliminary Modeling shows DWR DSM2 model simulation results for Alternative 2C 16-year mean daily flows in the reach of Old River where the City of Tracy outfall is located. The figure demonstrates that there is inadequate flow to meet the minimum dilution criteria (250 cfs) when the head of Old River fish gate is completely closed in Alternative 2C for the 60 day VAMP period (April 1 – May 31). The above minimum dilution criteria is based on water quality objectives to comply with Human Health Effluent Limits for Trihalomethanes (such as Dibromochloromethane and Bromodichloromethane). The harmonic mean flows and the mean daily flows in this reach are less than 250 cfs during the VAMP period, except when the head of Old River gate was open during the wet years of 1982 and 1983 and the above-normal year of 1978, when the flow at Vernalis is above 10,000 cfs. This reduction in flow in Alternative 2C caused by the complete closure of the fish gate at the head of Old River has a significant impact on the flows and resulting dilution at the Tracy WWTP discharge.

COT-5

Figure 3 of the Preliminary Modeling shows that the flow will be less than the required 250 cfs approximately 2% of the time in the "No Action" Alternative and approximately 13% of the time in Alternative 2C. Thus, even accepting the temporary barriers as the baseline for evaluating impacts, the SDIP's preferred alternative increases the frequency by which inadequate flows will be in Old River by 600%.

D. *The Draft EIS/EIR's Cumulative Impacts Analysis is Inadequate*

The Draft EIS/EIR piecemeals the environmental analysis by failing to address the cumulative impacts of the temporary barriers and the SDIP. CEQA requires an EIR to discuss the cumulative effect on the environment of the subject project in conjunction with other closely related past, present and reasonably foreseeable probable future projects. (Pub. Res. Code §21083(b) (emphasis added).) The term "[c]umulative impacts refers to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (14 C.C.R. §15355.) These guidelines must be interpreted to afford the fullest possible protection to the environment within the reasonable scope of their language. (See *San Franciscans for Reasonable Growth v. City and County of San Francisco*, 151 Cal.App.3d 61 (1984).)

COT-6

The Draft EIS/EIR's cumulative impacts discussion virtually omits any reference of the City's WWTP or its expansion. Pages 5.3-6 and 5.3-7 of the Draft EIS/EIR, which discuss Delta Water Quality Issues and Delta Water Quality Variables, include no discussion of the Tracy WWTP. Page 7.3-4 of the Draft EIS/EIR merely mentions that the City of Tracy "operates a sanitary sewer system and community treatment plant."

Moreover, the Draft EIS/EIR's cumulative impacts discussion includes no analysis of the combined impact of the SDIP and the temporary barriers along with other sources of cumulative impacts such as the Tracy WWTP, despite the fact that they certainly have a combined impact on water quality. By ignoring the temporary barriers' impacts, DWR ignores CEQA's specific direction to consider past projects as potential sources of cumulative impacts and runs counter to the legal maxim that "[i]n analyzing statutory language, we seek to give meaning to every word and phrase in that statute." (*Hughes v. Bd. of Architectural Examiners*, 17 Cal.4th 763, 775 (1998).)

Comments on Draft EIS/EIR
South Delta Improvements Program
February 7, 2006
Page 7 of 8

FEB 22 2006 000217

Not only does the Draft EIS/EIR virtually omit mention of the WWTP, the Draft EIS/EIR also fails to analyze adequately the cumulative impacts of the SDIP in combination with the temporary barriers and/or other effluent distributors that are sources of closely related impacts. For example, Chapter 10 of the Draft EIS/EIR mentions "Mountain House" in passing, but provides no indication that the analysis of the cumulative impacts upon water quality and utilities took into account the effluent from that project. In fact, Mountain House Wastewater Treatment Facility is located approximately 8 miles downstream of the City WWTP's outfall and is projected to discharge 5.4 mgd of tertiary treated wastewater into Old River in the near future. It is certainly reasonably foreseeable that the impacts of this discharge are closely related to those of the SDIP and the City's WWTP. The failure to discuss this combined impact is further evidence that the Draft EIS/EIR fails to satisfy CEQA's requirements.

COT-6

E. *The Draft EIS/EIR Also Conceals Impacts By Relying Upon an Improper "No Action" Alternative*

COT-7

The Draft EIS/EIR's "No Action" Alternative similarly conceals the barriers' real world impacts. Page 5.3-28 of the Draft EIS/EIR states that Alternative 1 (No Action) consists of existing conditions, which in turn includes placement of the temporary barriers. Under the CEQA Guidelines, the No Project Alternative includes the conditions that "would be reasonably expected to occur in the foreseeable future if the project were not approved..." (14 C.C.R. §15126.6(e).) The "No Action" Alternative assumes that these same conditions would exist in 2020 despite the fact that, as described above, DWR had to affirmatively request permission to continue the temporary barriers, and had committed itself to remove, replace, or modify the barriers if shown to have significant negative impacts. Nonetheless, the Draft EIS/EIR's "No Action" Alternative fails to incorporate the reasonable assumption that *temporary* barriers would be discontinued during the proposed project's 20 year term. By utilizing a "No Action" Alternative that assumes continuation of the temporary barriers, the Draft EIS/EIR's alternatives analysis wholly ignores the real world impacts to the City's WWTP that the SDIP will cause.

F. *The Draft EIS/EIR Fails to Identify All Feasible Mitigation Measures and Alternatives that could Reduce the Impacts to a Less Than Significant Level*

In large part because the Draft EIS/EIR unlawfully manipulates the baseline and piecemeals the project, the Draft EIS/EIR improperly determines the level of potentially significant environmental impact, and then fails to include measures to mitigate those impacts to less than significant levels. Most importantly, the Draft EIS/EIR fails to identify pumping of water into Old River as necessary mitigation during all times when dilution is not otherwise available to the Tracy WWTP. (See 14 C.C.R. §15126.4(a)(1) (stating that an EIR must identify all feasible measures that could minimize significant adverse impacts). See Preliminary Modeling at 5-6.) As discussed in the Preliminary Modeling, the minimum flow necessary to provide adequate water quality and temperature in Old River, as well as sufficient dilution of the WWTP's discharges into Old River, is approximately 250 cfs. Absent a mitigation measure or project alternative that provides such diluting flows, the Draft EIS/EIR is inadequate under CEQA.

COT-8

Comments on Draft EIS/EIR
South Delta Improvements Program
February 7, 2006
Page 8 of 8

FEB 22 2006

000217

III. *Conclusion*

As set forth above, the Draft EIS/EIR violates multiple provisions of CEQA including the statute's and Guidelines' requirements regarding environmental setting, baseline, project-specific impacts, cumulative impacts, alternatives, and mitigation measures. Because of these legal deficiencies, the Draft EIS/EIR must be revised and recirculated to reflect accurately the SDIP's environmental impacts.

Sincerely,



Debra Corbett
City Attorney

cc: (w/enclosures)

Tracy City Council
Daniel Hobbs (City)
Nancy Saracino (DWR)
Daniel Shillito (Bureau)
Steve Bayley (City)
Vijay Kumar, CH2M HILL
David R. E. Aladjem (Downey Brand)
Wendy Bogdan (Downey Brand)

ca:dec:ceqa:sdip comment ltr EIS-EIR (2-7-06).doc

Responses to Comments

COT-1

The proposed gate operations in the SDIP Draft EIS/EIR (as described in Chapter 2 of the Draft EIS/EIR) include maintaining flows from the San Joaquin River into Old River. The tidal operation of the three agricultural tidal gates will provide net flows in Old River, Middle River, and Grant Line Canal that were not possible under the temporary barriers program. Therefore, the proposed operations will provide net flows in Old River that could meet dilution requirements of the RWQCB. Model runs were shared with the City's consultant during the SDIP Draft EIS/EIR comment period.

COT-2

The memorandum from Mr. Peterson is still correct, the temporary barriers program causes very slow-moving water in Old River between Grant Line Canal and the temporary barrier near the Mountain House development. The proposed operations will provide net flows in Old River and eliminate stagnant areas. Model runs were shared with the City's consultant during the SDIP Draft EIS/EIR comment period.

COT-3 and COT-5

The City of Tracy WWTP dilution flow needs of 250 cfs in Old River downstream of Middle River were not directly discussed in the SDIP Draft EIS/EIR. Tidal flows at this location will be considered in the gate operations, which will be directed by the GORT (see Master Response O, *Gate Operations Review Team*). Modeling indicates that the City's minimum dilution flow requirement may be possible approximately half of the time.

COT-4 and COT-7

Please see Master Response G, *No-Barrier Conditions Compared with the No-Action Baseline*. The City of Tracy wastewater dilution flows would be similar for the existing conditions (with temporary barriers) and for conditions without temporary barriers. The head of Old River diversions are only slightly restricted by the temporary barriers in the summer. The head of Old River fall placement has been the existing conditions since about 1965. The spring barrier includes culverts to allow a minimum flow of about 250 cfs into Old River.

COT-6

The Cumulative Impacts analysis does not include wastewater treatment plants located in the Delta. The pertinent effects associated with water quality effects from the SDIP involve salinity and the routing of San Joaquin River water in the south Delta. Although Mountain House and the City of Tracy will discharge increased wastewater effluent into the south Delta in the future, their treatment and dilution are adequate to satisfy water quality standards. The small effects of the temporary barriers program on salinity are described in Master Response G, *No-Barriers Conditions Compared with the No-Action Baseline*.

COT-8

Please see response to comment COT-3.

Comment Letter HVT

HVT

LAW OFFICES
MORISSET, SCHLOSSER, JOZWIAK & McGAW
A PROFESSIONAL SERVICE CORPORATION

SHARON I. HAENSLY (WA)
FRANK R. JOZWIAK (WA)
KYLE A.M. MCGAW (WA, OK)
MASON D. MORISSET (WA)
THOMAS P. SCHLOSSER (WA)
ROB ROY SMITH (WA, OR, ID)
THANE D. SOMERVILLE (WA)

COMPTROLLER
M. ANN BERNHEISEL

1115 NORTON BUILDING
801 SECOND AVENUE
SEATTLE, WA 98104-1509

TELEPHONE: (206) 386-5200
FACSIMILE: (206) 386-7322

Via Electronic & First Class Mail

February 7, 2006

WWW.MSAJ.COM

FEB 10 2006 00194

Mr. Paul A. Marshall
California Department of Water Resources
1416 9th Street – 2nd Floor
Sacramento, CA 95814

Ms. Sharon McHale
U.S. Bureau of Reclamation
Mid-Pacific Region, 2800 Cottage Way,
Sacramento, California 95825

Email: marshall@water.ca.gov
smchale@mp.usbr.gov

Re: Hoopa Valley Tribe's Comments Concerning South Delta Improvements Program
Draft Environmental Impact Statement/Environmental Impact Report (October
2005) ("SDIP DEIS")

Dear Mr. Marshall and Ms. McHale:

On behalf of the Hoopa Valley Indian Tribe ("Tribe"), we submit the following
comments concerning the South Delta Improvements Program Draft Environmental Impact
Statement/Environmental Impact Report (October 2005) ("SDIP DEIS").

The Tribe believes that, overall, the proposed action in the SDIP DEIS should be
beneficial for smelt and Chinook salmon. To the extent that the DEIS so provides, the Tribe
supports efforts to reduce entrainment and does not object to pumping, provided that the volume
and timing of the water diversions is calculated to avoid harm to fisheries, particularly Klamath
and Trinity River fisheries. The Tribe also supports actions, such as those proposed in the DEIS
that might, in turn, improve compliance with applicable Biological Opinions, including the two
opinions on the Long-term Central Valley Project and State Water Project Operations Criteria
and Plan ("CVP OCAP BiOp"), thereby reducing the demand for Trinity River exports.
However, the Tribe is concerned with the inadequacy of the SDIP DEIS's discussion of adverse
effects on the Trinity River fisheries from carryover storage capacity and the adverse effects of
the proposed action on the Tribe's federally reserved fishing rights. In particular, the SDIP DEIS
must conform to the Trinity River Mainstem Fishery Restoration EIS (Oct. 2000) and the Trinity
River Record of Decision ("ROD"); it should clearly state that the proposed action here is not
intended to change the Trinity ROD in any way.

HVT-1

Paul A. Marshall
Sharon McHale
February 7, 2006
Page 2

FEB 10 2006 00194

For these and other reasons, the SDIP DEIS is inadequate and must be revised and recirculated. These comments reflect the Tribe's ongoing concern with management of the CVP, which includes the Trinity River Division, and its effect on the federally-reserved fishing rights of the Tribe.

A. Nature of the Tribe's Interest

Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Hoopa Valley Tribe. The fishery was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The Hoopa Indians follow exacting cultural practices to protect individual runs of fish and to celebrate the bounty of the river that gives life to their people. The salmon fishery also holds significant value in the Hoopa culture and economies, and the Tribe holds property rights in the Trinity River Basin fishery. See Mem. from John D. Leshy, Solicitor of the Department of the Interior to the Secretary of the Interior 3, 15, 18-21 (Oct. 4, 1993), *cited with approval*, *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996). The lower twelve miles of the Trinity River and a stretch of the Klamath River flows through the Hoopa Valley Reservation.

The CVP has a direct and dramatic effect on fisheries reserved for the Tribe. The Trinity River Division ("TRD"), which is part of the CVP, diverts water from the Klamath-Trinity River Basin by means of a system of dams and trans-mountain diversion works. Act of August 12, 1955 ("1955 Act"), 69 Stat. 719, Pub. L. 84-386 (authorizing construction and operation of the TRD). Water diverted by the TRD eventually flows into the Sacramento River and Delta, and becomes part of the supply available to satisfy CVP water service delivery contracts. Trinity River operations affect the volume of water available for export.

Congress authorized the TRD after being advised that approximately 50% of the Trinity's flow would be diverted and that the balance of the Trinity's flow would remain in the Trinity-Klamath River system and basin. In section 2 of the 1955 Act, Congress expressly made diversion to the Central Valley subject to requirements for fish and wildlife preservation and propagation in the Klamath-Trinity River Basin. However, upon completion of the TRD in 1964, up to 90% of the Trinity's flow was diverted. TRFEFR at 8, 63-64. Fishery studies throughout the late 1970s and early 1980s determined that the operation of the TRD was the single greatest contributor to the Trinity fishery declines. The devastating effects on the anadromous fishery resulted in listing of Klamath-Trinity coho salmon under both state and federal Endangered Species Acts.

Congress has enacted a number of laws intended to restore the Trinity River fishery, including: the 1955 Act, the Trinity River Basin Fish and Wildlife Management Act, Pub. L. 98-541, 98 Stat. 2721 (1984), the Trinity River Basin Fish and Wildlife Management Reauthorization Act, Pub. L. 104-143, 110 Stat. 1338 (1996), and Section 3406(b)(23) of the CVPIA, Pub. L. 102-575, 106 Stat. 4600. In particular, CVPIA § 3406(b)(23) directed the

Paul A. Marshall
Sharon McHale
February 7, 2006
Page 3

FEB 10 2006 00194

Secretary to determine and, upon concurrence of the Tribe, implement permanent instream fishery flow requirements and operating criteria and procedures for the Trinity River Division to restore and maintain the Trinity River fishery. This provision was one of many Congress added to the CVP authorizing legislation in 1992 in conjunction with that Act's clarification that the CVP be operated for the purposes of protecting fishery resources, mitigating fish and wildlife impacts, as well as providing water deliveries to irrigators and municipalities and industrial users. *See, e.g., CVPIA § 3406(a).*

In accordance with the specific directive of CVPIA § 3406(b)(23), the TRFEFR was completed in June 1999. The Tribe concurred in the Flow Study results on December 18, 2000. Related environmental reviews were completed and, on December 19, 2000, the Secretary and the Tribe signed the ROD implementing a suite of habitat improvement actions including instream fishery flow releases from the TRD commensurate with those recommended in the TRFEFR ("Flow Study").

The Tribe is committed to ensuring that Reclamation's actions comply with applicable law, including the CVPIA, the Endangered Species Act ("ESA"), 16 U.S.C. § 1631 *et seq.*, and the government's trust responsibility to the Tribe. The Tribe is also fully committed to the timely implementation of the scientifically based fishery flow requirements set forth in the Trinity River Flow Study and mandated by the ROD. *See Westlands v. United States*, 275 F. Supp.2d 1157 (E.D. Cal. 2002), *rev'd on other grounds*, 376 F.3d 853 (9th Cir. July 13, 2004), *reh'g denied* (9th Cir. Nov. 8, 2004) (upholding the Trinity River EIS and concluding that "nothing remains prohibiting the full implementation of the ROD, including its complete flow plan for the Trinity River").

B. Specific Comments

1. Operations Related Effects on Trinity River Fisheries

The SDIP DEIS fails to fully analyze the effects of the proposed operations on Trinity River fisheries in three primary ways. First, the DEIS only includes a limited analysis of effects on coho salmon and does not analyze effects on fall and spring Chinook, winter and summer steelhead, lamprey, and sturgeon. Second, the DEIS fails to discuss the fact that the proposed Trinity Reservoir carryover storage may have negative effects on the survival of Trinity River fisheries and does not comply with the storage mandates of the Trinity River EIS. Third, the DEIS does not take into account the requirements of the ROD. We discuss each concern in turn.

HVT-2

HVT-3

a. Inadequate Discussion of Effects on Chinook and Steelhead

The DEIS fails to recognize the importance of steelhead and Chinook in tribal harvest. The DEIS admits that "[c]hanges in water supply operations, however, may affect Trinity Reservoir storage and Trinity River flow." DEIS at 6.1-87. Nevertheless, these concerns are rejected out-of-hand. It is unclear how the DEIS reaches this conclusion and on what the analysis is based.

HVT-4

Paul A. Marshall
Sharon McHale
February 7, 2006
Page 4

FEB 10 2006 00194

The absence of biological support for the conclusion that any adverse effects on steelhead and Chinook are insignificant is made clear when the DEIS opines: “[e]ffects on Chinook salmon, steelhead, and other species are not discussed for the Trinity River. The effects on coho salmon are representative of the potential effects on Chinook salmon and steelhead.” *Id.* This statement flies in the face of the purpose of the DEIS. How can the effects on coho be the same for Chinook if the effects on Chinook were not even discussed? Such circular logic fails to provide a “hard look” at the affects of the proposed action of the Trinity River fisheries. Moreover, the bare statement comparing coho to other anadromous fish species in the Trinity River grossly oversimplifies fish biology and ignores the life history of all species in the Trinity River. For instance, adult coho salmon generally migrate and spawn when temperature concerns are minor (late fall/winter). In contrast, spring Chinook, fall Chinook, and summer steelhead spawn, migrate, and hold during periods when temperatures are more likely to be a concern (summer/early fall). This one just one example of the crucial biological differences between the species that rely on a healthy Trinity River that must be accounted for when Reclamation provides for the timing of exports from the Trinity River.

HVT-4

The DEIS must be revised and recirculated to provide a full analysis of effects of the proposed action on Chinook salmon, steelhead, and other species upon which the Tribe relies. The associated requirement to modify the timing and volume of Trinity River exports to meet the migration and survival needs of these fish must also be analyzed and discussed in a revised and recirculated DEIS.

b. Inadequate Discussion of Temperature Effects

Second, the DEIS fails to discuss the fact that the proposed Trinity Reservoir carryover storage will likely have a negative impact on the survival of Trinity River fisheries. The DEIS seems to suggest that increased exports from the Trinity River to the Sacramento River will actually reduce Trinity River temperatures. DEIS at 6.1-88 (“As indicated previously, changes in Trinity River flow are minimal and would not affect water temperature”). This is not entirely true and ignores the effects of ambient air temperatures on storage waters. The DEIS does not fully analyze the effect of increased exports on the water temperature of the remaining storage waters. Cold water reserves are necessary to ensure adequate temperatures in the Trinity River for survival of Trinity River fish.

HVT-5

Trinity Reservoir, or Trinity Lake, is a 2.48 million acre-foot reservoir located on the Trinity River near Lewiston, California. Water released from Trinity Dam is approximately 45°F, and can be diverted through the Clear Creek and Spring Creek tunnels to the Sacramento River for use by the CVP. Importantly, the water stored in the reservoir can and must also be released into the Trinity River to meet fishery needs in the Trinity River and the Lower Klamath River. Since the massive adult salmon kill of 2002 where at least 68,000 adult Chinook salmon died due to degraded water conditions caused by Klamath Project operations, additional water has been released from Trinity Dam in an effort to prevent another fish kill. Releases were made in 2003 and 2004, but were deemed unnecessary in 2005. Releases of water from the reservoirs behind the Trinity and Lewiston Dams have been shown to significantly decrease water

Paul A. Marshall
Sharon McHale
February 7, 2006
Page 5

FEB 10 2006 00194

temperatures by 5-6°F in the Trinity River and increase dissolved oxygen in the Lower Klamath River, approximately 112 miles downstream of Lewiston Dam.

HVT-5

Compounding temperature problems, Trinity Reservoir capacity is approximately twice the size of the average annual inflow from the upstream watershed. Accordingly, the refill potential of the reservoir is extremely low compared to other reservoirs such as Shasta Lake, which has an inflow roughly equal to its size. Once Trinity Reservoir is drawn down during an extended dry period, the Reservoir will not adequately refill due to the limited inflow. The reduced inflow capacity will cause the Reservoir water levels to drop even further. The decreased water levels render the remaining storage water susceptible to the effects of ambient air temperatures. This, in turn, limits cold water supplies, reducing an important source of cold water necessary for release to the Trinity and Lower Klamath Rivers to maintain river temperatures at levels consistent with fish survival.

The DEIS seems to acknowledge this problem when it states that increased water temperature in the Trinity River during the fall months "could have an adverse effect on coho salmon and other salmonids." DEIS at 6.1-88. As discussed above, the reason for the adverse effect is clear. Inexplicably, however, the DEIS does not analyze the issue further or provide a solution to the risk of increased temperatures and fish mortality caused by reduced volumes of water storage due to increased exports under the SDIP DEIS. The failure to address increased temperatures of storage water is especially troubling because, if the heated water is released for fishery flows, the Trinity River may not meet the temperature objectives for the Trinity River adopted by the Hoopa Valley Tribe, North Coast Regional Water Quality Control Board, and U.S. Environmental Protection Agency. The water releases may also violate the temperatures standards adopted in the Trinity River ROD/EIS that requires water released into the Trinity River "be no more than 5°F warmer than the receiving water temperatures." Trinity River EIS at 3-125. The increased temperatures may also jeopardize salmonid health and survival.

The SDIP DEIS must be revised to include a full analysis of the effects of increased Trinity River temperatures caused by reduced carryover capacity on the Tribe's fishing rights and salmon survival, and to ensure consistency with state, federal and tribal water quality standards and objectives.

c. Failure to Account for the Trinity ROD and Inadequate Discussion of Carryover Capacity

HVT-6

The ROD calls for increased fishery flows into the Trinity River from the Trinity and Lewiston Dams, corresponding to roughly a 1/1 reduction in water exports to the Sacramento River. ROD at 20-23. Reclamation, under the guise of the SDIP, appears to reject the ROD's mandate for decreased exports to the CVP commensurate with the increase in fishery flows. The SDIP DEIS makes clear that Reclamation intends to continue historic deliveries of CVP water, as is also stated in the numerous CVP Long-term Contracts providing for status quo water deliveries. DEIS at 1-10 (purpose of the proposed action is to "increase water deliveries and delivery reliability to SWP and CVP water contractors south of the Delta").

Paul A. Marshall
Sharon McHale
February 7, 2006
Page 6

FEB 10 2006 00194

The failure of the DEIS to account for the Trinity ROD is made clear in the DEIS's discussion of the "potential impacts from the SDIP operations on the Trinity River" in Appendix Q. A mere four pages of text, Appendix Q makes clear a perceived unimportance of fish and wildlife, and correspondingly, the federally reserved fishing rights of the Tribe, in the Trinity River. Appendix Q provides: "Trinity River Division operations are primarily governed by (1) the need for exports to the Sacramento Basin to increase CVP water supply and/or hydropower production, (2) satisfying the fish and wildlife flow and temperature requirements along the Trinity River, and (3) maintaining flood control in accordance with safety of dams criteria." DEIS at Q-2. The order of priorities listed is telling. Despite the Trinity ROD and CVPIA § 3406(b)(23), the Tribe's rights are never mentioned.

HVT-6

The ROD is only mentioned in passing. The DEIS states that the ROD requires Trinity River flows of "368-815 thousand acre-feet" annually. *Id.* This is a gross oversimplification of the flow requirements of the ROD. The DEIS fails to account for the fact that, within this volume allocation, there must be sufficient flows measured in cubic feet per second (cfs) for a specified number of days for operation and management of the TRD to be in compliance with the ROD for the stated water year type. ROD at 12. In fact, it would appear that the DEIS confuses acre-feet with cubic feet per second. The SDIP DEIS includes tables that identify both exports from the Trinity River to the Sacramento River, as well as Trinity River instream flows, in terms of cubic feet per second. *See, e.g.*, Tbl. 5.1-1. This is misleading and inconsistent with other environmental documents related to the CVP wherein the quantity of water (*e.g.*, such as for exports) is measured in acre-feet. Cubic feet per second is a measurement of the rate of water movement, and is usually used to measure specific flows. For instance, one cubic foot per second of water flowing for 24 hours produces approximately 2 acre-feet. Acre-feet is an appropriate measure for quantity of water. The DEIS should be revised and recirculated to properly identify effects and proposed mitigation measures using commonly accepted and understood terms.

The DEIS's failure to discuss the ROD and the corresponding need to manage and operate the TRD to protect the Tribe's federally reserved fishery is inexcusable. The effects of the failure of the DEIS to account for the ROD is highlighted by the provided "summary of impacts for the SDIP program" in Table 4-1. The table provides that the impact of the SDIP program on salmonids within the Trinity River will be "less than significant." Tbl. 4-1. This statement is extremely misleading, and is based on flawed assumptions that conflict with the requirements of the ROD and the Trinity River EIS.

The DEIS's discussion of the TRD provides that, based on the simulation used to predict carryover capacity, a minimum pool of 250,000 acre-feet every few years, with 500,000 acre-feet every several years, would be the minimum pool for the reservoir. DEIS at 5.1-9. However, the Trinity River EIS preferred alternative mandates a higher reservoir capacity. The Trinity River EIS requires Trinity Reservoir minimum storage to range from 400,000 to 600,000 acre-feet annually. Trinity River EIS at 3-83. In other words, the proposed carryover capacity falls far short of the Trinity River EIS requirements. Based on the SDIP simulations, there would be 21 years out of 100 where the minimum pool for the reservoir would be less than the level mandated

Paul A. Marshall
Sharon McHale
February 7, 2006
Page 7

FEB 10 2006 00194

by the Trinity River EIS. See Fig. 5.1-1, 5.1-2. The inadequate storage proposed, and the DEIS's complete failure to consider the Trinity River ROD requirements, could have a severe adverse effect on salmonids in the Klamath-Trinity Basin. Water temperatures instream would regularly exceed state, federal and tribal water temperature standards and objectives. The SDIP DEIS must be revised to be consistent with the mandates of the Trinity River EIS and ROD.

HVT-6

Finally, the Tribe notes that the baseline used by the DEIS, the year 2001, is not accurate because, as the DEIS admits, Trinity River ROD flows were not fully implemented that dry year. DEIS at 5.1-9 – 10. The DEIS should use as a baseline the year 2005 where the ROD flows were being implemented as anticipated in the ROD. Otherwise, the DEIS presents a skewed view of the environmental baseline, seriously compromising the remaining analysis. Indeed, because ROD flows were not fully implemented in 2001, additional water was available for export. Such water may not be available for export now if the baseline actually reflected current conditions. The 2001 baseline does not adequately represent the existing environmental baseline and must be revised.

HVT-7

2. Indian Trust Assets

The DEIS's description and manner of addressing "Indian Trust Assets" is incomplete and incorrect. The DEIS provides that:

In the north-of-Delta area, the Hoopa Valley Tribe has fishing rights on the Trinity River. The Hoopa Valley Indian Reservation was established along the Trinity River in the late 1800s. Historically, Trinity River fisheries provided the primary dietary staple and also supported commercial and subsistence fishing for Indians in the area. The fisheries also played a significant role in the tribes' religious beliefs (U.S. Department of the Interior 2000). The Environmental Consequences subsection below concludes there are no adverse effects on the trust assets of the Hoopa Valley Tribe . . .

DEIS at 7.10-2. The Tribe appreciates the DEIS's appropriate recognition of the Tribe's federally reserved fishing rights. However, as a practical matter, this recitation of the Tribe's rights is incomplete and fails to account for the importance of the Trinity River and its fishery to the Tribe. For instance, the DEIS fails to account for the fact that the Hoopa Valley and Yurok Tribes also have federally reserved fishing rights in the Klamath River. This fact should be acknowledged. Other aspects of the Tribe's use of the Trinity River and its natural bounty are overlooked. The Tribe suggests that the DEIS be updated to include a more complete discussion of the nature of the Tribe's rights and interests as provided in Section A *supra* herein or the Trinity River EIS at section 3.6.

HVT-8

Second, there very well may be "adverse effects" on the Tribe's federally reserved fishing rights. The consideration of "Indian Trust Assets" in the DEIS completely fails to acknowledge the nature of water rights associated with tribal fishing rights. For example, the Tribe's federally-reserved fishing right guarantees to the Tribe the right to a fishery that will support a moderate standard of living. As has been repeatedly acknowledged by the federal

HVT-9

Paul A. Marshall
Sharon McHale
February 7, 2006
Page 8

FEB 10 2006 00194

courts, tribes are entitled to sufficient water in rivers flowing through their lands to support a fishery that will meet those needs despite the prospect of increasing state wide water demand. Accordingly, as the needs of the Tribe and the fishery change, so must the water delivery contracts and export provisions affecting the ability to sustain that fishery. The DEIS's analysis of this issue is nonexistent and legally inadequate.

The failure to account for the Tribe's needs is highlighted by the DEIS's failure to discuss, let alone acknowledge, that the CVPIA requires operation and management of the CVP to protect the Tribe's federally reserved fishing rights. Chapter 8 of the DEIS purports to discuss "the major requirements for permitting and environmental review and consultation for implementation of the SDIP." DEIS at 8-1. Yet, the DEIS ignores CVPIA § 3406(b)(23) that mandates the Secretary's fiduciary duty to the Tribe and includes the obligation that the Secretary meet the instream fishery flow requirements of the Trinity River as specified in TRFEFR. *See* DEIS 8-14. The DEIS must reference and follow the legal requirements expressed in CVPIA § 3406(b)(23).

HVT-10

3. Concerns with Multiple NEPA Documents

The Tribe is concerned by the continued decision of Reclamation to release multiple NEPA documents staggered over a period of years that, like this DEIS, appear to pass responsibility for reviewing certain other aspects of related water diversions off to other pending NEPA documents. For instance, the Tribe previously provided comments concerning the two Draft Central Valley Project, West San Joaquin Division, San Luis Unit Long term Water Service Contract Renewal Environmental Impact Statements (November 2004 and September 2005). The Tribe also provided comments concerning Central Valley Project Long term Renewals of Water Service Contracts for Delta Mendota Canal (Delta Division), San Luis Unit, etc. (October 2004) and the Delta Mendota Canal Unit Draft Environmental Assessment Long term Contract Renewal (November 2004) ("DMC DEA") in separate letters in 2004. These comments are incorporated by reference herein.

HVT-11

The SDIP DEIS is premature because it presumes decisions south of the Delta and drainage issues in the San Luis Unit of the CVP that are currently subject to ongoing separate environmental analyses. For instance, environmental review of the San Luis Drainage Feature Re-Evaluation has not been completed. Reclamation is also currently negotiating Long-term Contracts for San Luis Unit and Western San Joaquin Division CVP contractors. NEPA documents concerning the Long-Term Contracts have been circulated for public comment, but have not been finalized. Both the Drainage Re-Evaluation and the San Luis Unit Long-term Contracts have a bearing on the SDIP DEIS. There cannot be the requisite "hard look" at the action and its cumulative effects under NEPA if relevant Long-term Contracts' terms are exempted from analysis in this and other DEISs. Reclamation's approach – limiting the scope of review of this NEPA document and passing off decisions between multiple NEPA documents – is arbitrary and capricious, and serves to confuse the public while avoiding consideration of the cumulative impacts of all the CVP Long-term Contracts and related water diversions on the environment. *See* 40 C.F.R § 1508.8 (discussing cumulative impacts).

Paul A. Marshall
Sharon McHale
February 7, 2006
Page 9

FEB 10 2006 00194

NEPA's disclosure purposes are undermined if the public is forced to navigate through a maze of contracts and environmental review documents to comprehend the true nature and far-flung effects of CVP water service contract renewal and increased water diversions for contractors provided through increased diversions in this DEIS. The SDIP DEIS should be integrated with elements of the larger CALFED program, CVP Long-term Contract renewals, and other CVP and SWP operations to provide a clear picture of the nature and scope of the effects on the environment of the proposed interrelated actions.

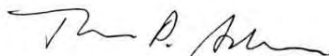
HVT-11

C. Conclusion

The Tribe urges Reclamation to revise and recirculate the SDIP DEIS to address the legal deficiencies noted above and to account for the legal obligation to protect the Tribe's federally reserved fishing rights. Thank you for the opportunity to comment on the DEIS. We trust that our comments will be appropriately considered and addressed in any final NEPA documentation for this proposed action.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & McGAW



Thomas P. Schlosser
Rob Roy Smith
Attorneys for the Hoopa Valley Tribe

cc: Kirk Rodgers
Steve Thompson

T:\WPDOCS\0020\05543\LTICR\Mar020206_m01.doc
nm: 2/6/06

Responses to Comments

HVT-1

Please see Master Response N, *Trinity River Operations*. Discussion of the possible effects of Trinity Reservoir carryover storage on fish and the potential effects of the SDIP on federally reserved fishing rights was not adequate.

HVT-2

The SDIP Draft EIS/EIR focuses on the coho salmon life history and all possible effects the project could have on the various coho life stages, such as adult migration and spawning and juvenile rearing and migration. While it is recognized that different species of fish have slightly different temperature criteria and life history timing, Chinook salmon temperature criteria were used in the temperature assessment as representative of migration, spawning, and rearing criteria for salmonids. Steelhead have water temperature requirements similar to those of coho salmon. Lamprey and sturgeon have water temperature criteria that are slightly warmer than for Chinook salmon.

HVT-3

Please see Master Response N, *Trinity River Operations*.

HVT-4

As described in Section 6.1, the possible effects on coho salmon were evaluated as being representative of the other important fish species. Because of the small changes in flows and temperatures simulated in the Trinity River, temperature criteria for the other important species were not evaluated separately.

HVT-5 and HVT-6

Please see Master Response N, *Trinity River Operations*.

HVT-7

The Trinity River Restoration flows were included in the 2020 baseline (Future No-Action) and 2020 Stage 2 SDIP alternatives. Appendix Q provides specific comparisons of Trinity River operations with and without the SDIP Stage 2 Alternative 2A.

HVT-8

The Klamath River flows are not affected by SDIP alternatives. The ongoing management of the Klamath and Trinity Rivers, including habitat restoration, water management, harvest management, and hatchery management activities, will provide the Hoopa Valley Tribe with their continuing federally reserved fishing rights.

HVT-9 and HVT-10

The Hoopa Valley Tribe appropriately cites in its comments CVPIA Section 3406(b)(23) as Congressional direction insuring, “the development of recommendations based on the best available scientific data, regarding permanent instream fishery flow requirements...” and specifically directed the completion of the 12-year Trinity River Flow Evaluation Study (TRFES)¹. Furthermore, upon concurrence of the Secretary and the Hoopa Valley Tribe, this Section 3406(b)(23) congressionally mandates the Secretary to “implement accordingly”² any increase to the minimum Trinity River instream fishery releases and the operating criteria and procedures.

Should SDIP be realized, the CVP water it conveys will be subject to many authorities and constraints including provisions of Federal Law such as CVPIA, rules and regulations promulgated by the Secretary of the Interior, and applicable provisions of the Trinity River Mainstem Fishery Restoration ROD, signed by the Chairman of the Hoopa Valley Tribe and the Secretary of the Interior, Bruce Babitt, on December 19, 2000.

As the Tribe has noted, the Trinity River Mainstem Fishery Restoration ROD “culminated nearly twenty years of detailed, scientific efforts, conducted over the course of the past four Administrations, and documents the selection of actions determined to be necessary and appropriate to restore and maintain the anadromous fishery resources of the Trinity River” and “The necessity for these actions results from the various statutory obligations of the Department as well as the federal trust responsibility to the Hoopa Valley and Yurok Indian Tribes.”³

“For reasons expressed in this ROD, the Department’s agencies are directed to implement the Preferred Alternative as described in the FEIS/EIR...” and “This alternative best meets the statutory and trust obligations of the Department to restore and maintain the Trinity River’s anadromous fishery resources, based on the best available scientific information, while also continuing to provide water supplies for beneficial uses and power generation as a function of Reclamation’s Central Valley project (CVP).”⁴

¹ Section 3406(b)(23)(A) of the Central Valley Project Improvement Act (CVPIA) P.L. 102-575 (1992).

² Section 3406(b)(23)(B) of the Central Valley Project Improvement Act (CVPIA) P.L. 102-575 (1992).

³ Paragraph 1, Page 2 from the Trinity River Mainstem Fishery Restoration Record of Decision.

⁴ Paragraph 2, Page 2 from the Trinity River Mainstem Fishery Restoration Record of Decision.

The ROD “recognizes that restoration and perpetual maintenance of the Trinity River’s fishery resources requires rehabilitating the river itself, restoring the attributes that produce a healthy, functioning alluvial river system.”⁵

Therefore, because (1) Reclamation’s federal trust obligations to the Hoopa Valley Tribe are depicted and directed in the Trinity River Mainstem Fishery Restoration Record of Decision and CVPIA, and that (2) SDIP must utilize CVP water in accordance with all applicable legal requirements, and that (3) the Trinity River Mainstem Fishery Restoration ROD and the CVPIA are among those requirements, and that (4) the nearest Indian Trust Assets to the SDIP project area, in the north-of-the-Delta area, is the Colusa Rancheria (adjacent to the Sacramento River) located 90 miles north of the project area, and lastly (5) there are no Indian tribes with federally-reserved rights to the water potentially conveyed through the SDIP, Reclamation concludes that the SDIP will have no impact, direct or indirect, on the Hoopa Valley Tribe’s trust assets or the trust assets of any other federally-recognized tribe, and therefore no changes are made to the final EIS.⁶

HVT-11

The SDIP is a completely independent action from all other projects currently being considered and under environmental review. Please also see Master Response Q, *Effects of the South Delta Improvements Program on San Joaquin River Flow and Salinity*.

⁵ Paragraph 4, Page 2 from the Trinity River Mainstem Fishery Restoration Record of Decision.

⁶ Required statements as directed in the Environmental Compliance Memorandum No. ECM97-2, dated May 8, 1997.

Comment Letter FOR/WWT

Page 1 of 4

229

FOR/WWT

From: Steve Evans [sevans@friendsoftheriver.org]
Sent: Tuesday, February 07, 2006 6:07 PM
To: Marshall, Paul
Subject: SDIP DEIR/S Comments

**FRIENDS OF THE RIVER
WINNEMEM WINTU TRIBE**

February 7, 2006

Mr. Paul A. Marshall

California Department of Water Resources

1416 9th Street – 2nd Floor

Sacramento, CA 95814

Re: South Delta Improvement Project DEIR/S

Dear Mr. Marshall:

Thank you for soliciting public comments in response to the South Delta Improvement Project (SDIP) Draft Environmental Impact Report/Statement (DEIR/S). Below are the joint comments of Friends of the River and the Winnemem Wintu Tribe.

After careful review, Friends of the River and the Winnemem Wintu Tribe believe that the SDIP DEIR/S should be withdrawn. There are a number of problems with the proposed project and its environmental document. These include:

SDIP fails to improve Delta water quality or fish habitat, or protect fish species.

SDIP represents an unsuccessful attempt to mitigate the impacts of current and future Delta pumping on Delta water quality, fish habitat, and fish species. In fact, the so-called "Improvements" in SDIP fail to improve a drop of Delta water quality or a cubic foot of fish habitat. It simply calls for the construction of barriers and dredging of channels to redirect water and limit (but not prevent) fish proximity to the

FOR/
WWT-1

3/2/2006

state and federal pumps. Overall Delta water quality will not be improved and will still fail to meet state and federal standards. In addition, overall fish habitat in the Delta will not be improved and the catastrophic decline of Delta fish species is likely to continue.

FOR/
WWT-1

SDIP assumes a future water use scenario that is no longer valid.

SDIP is predicated on the assumption in Bulletin 160-98 that California needs to export more water from the Delta. In fact, the just completed Bulletin 160-05 includes three future water use scenarios for California, one of which meets the state's water needs through 2030 while actually reducing water use over current levels, particularly in the San Joaquin Valley. This would mean a reduction in Delta pumping. In addition, Delta pumping will be further reduced in response to the retirement of San Joaquin Valley farm acreage with significant drainage problems in the next decade. It is clear that the water use assumptions in Bulletin 160-98, and the increased Delta exports on which they are predicated, are no longer valid. The CALFED ROD, which called for increased Delta pumping, has been rejected in court, in part because it failed to analyze reduced pumping alternatives. So the programmatic justification for SDIP is no longer valid.

FOR/
WWT-2

SDIP is proceeding while Delta fisheries are crashing.

The populations of at least four fish species in the Delta are declining precipitously. At least three species are now at the lowest numbers ever recorded. The threatened Delta smelt, which is found nowhere else in the world, may soon become extinct. And yet, state and federal agencies are proposing to ultimately increase diversions of fresh water from the Delta. This simply makes no sense and is contrary to several state and federal laws, including the Endangered Species Act.

FOR/
WWT-3

SDIP is based on inadequate Biological Opinions for Salmon and Delta smelt.

A federal audit has found that Biological Opinions issued for salmon and Delta smelt for the proposed CVP operation changes to accommodate SDIP violated federal procedures. The Delta smelt BO assumes "no jeopardy" based on the invalid assumption that the Environmental Water Account (EWA) will be fully funded and implemented, even though the EWA has never been fully funded or implemented. A CALFED science review panel further found the salmon BO failing to take into account climate change. The "no jeopardy" decisions associated with these BOs and the assumption that SDIP will not harm threatened and endangered fish species are no longer valid.

FOR/
WWT-4

The SDIP DEIR/S fails to consider a reasonable range of alternatives, including a reduced pumping alternative.

The SDIP DEIR/S considers only three alternatives (no action, and two alternatives that increase pumping). A reasonable range of alternatives as required by both CEQA and NEPA would logically include a reduced pumping alternative. Given the "less water use" scenario outlined in Bulletin 160-05, a reduced pumping alternative is certainly more than theoretical at this point. Any further consideration

FOR/
WWT-5

3/2/2006

of SDIP should, at the minimum, consider a reduced pumping alternative.

The SDIP DEIR/S fails to identify and mitigate adverse direct, in-direct, and cumulative impacts on Delta fish species and threatened Sacramento River and San Joaquin salmon and steelhead as required by CEQA and NEPA.

The SDIP DEIR/S fails to adequately account for entrainment and overall habitat degradation impacts on Delta smelt. SDIP could increase entrainment of Sacramento splittail by more than 40% -- an impact apparently considered to be insignificant. CVP operation changes to accommodate SDIP (a.k.a. OCAP) would eliminate cold water storage in Shasta reservoir for endangered salmon and reduce winter run Chinook salmon habitat by nearly 20 miles in the Sacramento River. Increased pumping under SDIP would entrain more San Joaquin system salmon. Few of these direct, in-direct, and cumulative impacts are adequately analyzed and none are mitigated according to law.

FOR/
WWT-6

The SDIP DEIR/S fails to identify and mitigate the project's impact on rural communities and Native Americans, as well as commercial, recreational, and subsistence anglers.

The DEIR/S fails to consider the environmental justice implications of SDIP. Rural communities and Native Americans, as well as commercial, recreational, and subsistence anglers would all be adversely impacted by the project. For example, the perceived need for SDIP increases pressure to enlarge the Shasta Dam and Reservoir -- a project that would flood the remaining cultural heritage of the Winnemem Wintu Tribe. Shasta Dam operation changes to accommodate SDIP reduces cold water for Sacramento River salmon, a former mainstay of the Tribe's diet. These impacts are not considered or mitigated.

FOR/
WWT-7

Conclusion

It makes no sense to increase Delta pumping when Delta fish species are crashing towards extinction and the future survival of upstream salmon and steelhead remain tenuous. Please withdraw the SDIP DEIR/S. At the minimum, a new DEIR/S should seriously consider a reduced pumping alternative, and fully identify and mitigate adverse impacts on Delta water quality, Delta fish species and habitat, upstream fish species and habitat, rural communities, Native Americans, and commercial, recreational, and subsistence anglers.

California does not need to increase Delta diversions to meet its current and future water needs. The California Water Plan (Bulletin 160-05) proves that increased investments in urban and agricultural water use efficiency and reclamation can meet our needs well into the future.

Please notify Friends of the River and the Winnemem Wintu Tribe of any decisions or activities concerning this project.

Sincerely,

3/2/2006

Page 4 of 4

Steven L. Evans

Conservation Director

Friends of the River

Gary Mulcahy

Emissary and Government Liason

Winnemem Wintu Tribe

3/2/2006

Responses to Comments

FOR/WWT-1

Section 5.3, Water Quality, of the SDIP Draft EIS/EIR provides an assessment of the changes in water quality as a result of constructing and operating SDIP Stage 1 and operating SDIP Stage 2. Tables 5.3-1 and 5.3-3 provide a summary of the results of the water quality assessment for Stage 1 and Stage 2, respectively. As shown in Table 5.3-1, salinity would decrease in many areas of the south Delta under Stage 1 for both 2001 and 2020 conditions. As shown in Table 5.3-3, salinity would slightly increase at the SWP Banks Pumping Plant, Old River at SR 4, Rock Slough, and Jersey Point under Stage 2. However, salinity would decrease at CVP Tracy Pumping Plant, Old River at Tracy Boulevard, Middle River, and Grant Line Canal.

Section 6.1, Fish, of the Draft EIS/EIR provides an assessment of SDIP construction-related and operation-related impacts on fish.

FOR/WWT-2

Please see Master Response D, *Developing and Screening Alternatives Considered in the South Delta Improvements Program Draft EIS/EIR*; Master Response J, *Relationship between the South Delta improvements Program and the CALFED Record of Decision and EIS/EIR Programmatic Documents*; and Master Response L, *Relationships between the South Delta Improvements Program and the California Water Plan Update 2005*.

FOR/WWT-3

In response to the issues surrounding the health of the Delta pelagic organisms, DWR and Reclamation have delayed making a decision on increasing CCF diversions to 8,500 cfs until a latter time. Please also see Master Response B, *Relationship between the South Delta Improvements Program and the Pelagic Organism Decline*.

FOR/WWT-4

Stage 1 of the SDIP includes constructing and operating the head of Old River fish control gate and the three flow control gates and conveyance dredging. ESA and CESA compliance for Stage 1 is being address through the Action Specific Implementation Plan process. DWR and Reclamation expecting the BOs for Stage 1 will be issued later this year.

Stage 2 of SDIP falls under the OCAP BOs. Reclamation has recently reinitiated ESA consultation with USFWS and NMFS on the OCAP BOs.

FOR/WWT-5

The SDIP Draft EIS/EIR includes an evaluation of the No-Action Alternative and five action alternatives. Table 2-1 of the SDIP Draft EIS/EIR provides a summary of the elements that were combined to create each alternative. The alternatives included a combination of gates and operational scenarios. The process for developing and screening these alternatives are described in EIS/EIR Appendix A, “South Delta Improvements Program Alternatives Development and Screening.” Master Response D, *Developing and Screening Alternatives Considered in the South Delta Improvements Program Draft EIS/EIR*, also provides a discussion of how the SDIP alternatives were developed and screened. Master Response L, *Relationship between the South Delta Improvements Program and the California Water Plan Update 2005*, provides a discussion of the consistencies between SDIP and 2005 California State Water Plan Update.


FOR/WWT-6

SDIP Draft EIS/EIR Section 6.1, Fish, provides an assessment of Stage 1 and Stage 2 impacts on Chinook salmon, steelhead, coho salmon, delta smelt, splittail, striped bass, green sturgeon, as well as other native and nonnative fish. The analysis was based, in part, on changes in reservoir storage, river flows, water temperature, and water quality. Expected changes attributable to operation of Stage 1 and Stage 2 of the SDIP are described in Section 5.1, Water Supply and Management, and Section 5.3, Water Quality. Section 6.1, Fish, includes an assessment of the expected changes in spawning, rearing, and migration habitat for the Sacramento, American, and Feather Rivers. The analysis suggests that operation of SDIP Stage 2 would not substantially change the cold water storage in Shasta Reservoir.

FOR/WWT-7

The environmental justice assessment is found in Section 7.9 of the SDIP Draft EIS/EIR. The assessment concluded that SDIP would not result in a disproportionate impact on minority or low-income communities. Section 7.10 provides an assessment of impacts on Indian Trust Assets. This assessment has been updated based on comments received from the Hoopa Valley Tribe. The impacts resulting from increasing the height of Shasta Dam was included as an element of the cumulative impact assessment as described in Chapter 10 of the Draft EIS/EIR.

Comment Letter ACWD

 <div style="text-align: right; margin-top: -20px;"><i>← Snow</i> <i>1. Johnson</i> <i>2. Kelly</i> ACWD</div>	
DIRECTORS JUDY C. HUANG President ARTHUR LAMPERT Vice President JAMES G. GUNTHER MARTIN L. KOLLER JOHN H. WEED	MANAGEMENT PAUL PIRAINO General Manager ROBERT SHAVER Engineering Manager KARL B. STINSON Operations Manager WILBERT LIGH Finance and Administration Manager
43885 SOUTH GRIMMER BOULEVARD • P.O. BOX 5110, FREMONT, CALIFORNIA 94537-5110 (510) 668-4200 • FAX (510) 770-1793 • www.acwd.org	
<p>February 1, 2006</p> <p style="text-align: right;">FEB 09 2006 00144</p> <p>Mr. Lester Snow Director Department of Water Resources P.O. Box 942836 Sacramento, CA 94236-0001</p> <p>Dear Director Snow,</p> <p>Subject: South Delta Improvements Program</p> <p>On behalf of the Alameda County Water District (ACWD), I am writing today to express our organization's support for the Department of Water Resources' (DWR) South Delta Improvements Program (SDIP), a critical water supply, water quality and environmental project designed to meet California's diverse water needs.</p> <p>ACWD provides water service to the homes and businesses of over 320,000 people in the cities of Fremont, Union City, and Newark located in the southeastern San Francisco Bay Area. ACWD, as a contractor of the State Water Project, depends upon the Delta for more than half of its water supply. This supply is critical to the well being of our families and businesses, including a portion of the Silicon Valley. It is our responsibility to use this precious resource wisely through all possible best management practices.</p> <p>The SDIP is part of the long term planning effort for the Sacramento-San Joaquin Delta and is a balanced way to provide for California's various interests and needs. The SDIP will improve our state's water supply reliability, water quality and the overall health of the Bay-Delta ecosystem. The program will construct seasonal tidal gates to protect fish, and improve water circulation and quality in the Delta. It will also allow State Water Project deliveries to increase modestly, but only when needed and environmentally safe to do so.</p>	

Mr. Lester Snow
Page 2
February 1, 2006

FEB 09 2006 00144

Again, ACWD supports the implementation of the proposed SDIP because it is a responsible, balanced plan that will allow us to better utilize and integrate our existing water management infrastructure in the Delta while also protecting the environment.

ACWD-1

Thank you.

Sincerely,



Paul Piraino
General Manager


cc (by facsimile): Hon. Governor Arnold Schwarzenegger, (916) 445-4633
Mr. Ryan Brodderick, Director, CA Dept. of Fish and Game (916) 653-7387
Mr. Mike Chrisman, Secretary, CA Resources Agency, (916) 653-8102
Mr. Joe Grindstaff, Director, California Bay-Delta Authority, (916) 445-7297
Mr. Kirk Rodgers, Regional Director, Mid-Pacific Region, U.S. Bureau of Reclamation, (916) 978-5114
Mr. Dan Skopec, Deputy Cabinet Secretary, Office of the Governor, (916) 324-6358
Mr. Terry Tamminen, Cabinet Secretary, Office of the Governor, (916) 324-6358

Responses to Comments

ACWD-1

The commenter's description of the project's benefits and support for the project are noted.

Comment Letter AVEKWA

<p>BOARD OF DIRECTORS</p> <p>ANDY D. RUTLEDGE Division 5 President</p> <p>KEITH DYAS Division 2 Vice President</p> <p>CARL B. HUNTER, JR. Division 1</p> <p>FRANK S. DONATO Division 3</p> <p>GEORGE M. LANE Division 4</p> <p>NEAL A. WEISENBERGER Division 6</p> <p>DAVID RIZZO Division 7</p>	 <p>A PUBLIC AGENCY</p>	<p><i>L. Snow</i> <i>1. [unclear]</i> <i>2. [unclear]</i></p> <p>AVEKWA</p> <p>RUSSELL E. FULLER General Manager</p> <p>BIST, BEST and KRIEGER Attorneys</p> <p>MARILYN L. METTLER Secretary-Treasurer</p> <p>BOYLE ENGINEERING CORP. Consulting Engineers</p>
<p>February 1, 2006</p> <p>Mr. Lester Snow, Director Department of Water Resources P. O. Box 942836 Sacramento, CA 94236-0001</p> <p>Re: Support for the South Delta Improvement Program (SDIP)</p> <p>Dear Director Snow:</p> <p>On behalf of the Antelope Valley area, the Antelope Valley-East Kern Water Agency is submitting this letter in support of the Department of Water Resources' South Delta Improvements Program (SDIP). SDIP is a project designed to meet California's diverse water requirements, and is critical to our water supply, water quality, and environmental protection.</p> <p>The Antelope Valley-East Kern Water Agency (AVEK), formed by a California uncodified act in 1959, operates a treated water supply and distribution system providing supplemental water from the State Water Project to approximately 25 retail water providers from Ventura County to eastern Kern County, including most of the Antelope Valley. In 1962, AVEK signed a contract with the state to assure delivery of imported water to supplement groundwater supplies, and, as one of three State Water Contractors in the Antelope Valley, has been delivering imported water for municipal, industrial and agricultural use since 1975. AVEK is the third largest among the 29 public water suppliers that contract with the State of California for water from the State Water Project. Our customer base includes Edwards Air Force Base, U.S. Borax, some area cities, many of the unincorporated communities and farms.</p> <p>AVEK is aware that California is facing a critical challenge to provide a safe, reliable, high quality water supply to a rapidly rising population and economy. As you know, our state has limited water supplies and water providers must better utilize existing water resources and infrastructure. Two-thirds of our state receive water from the San Francisco Bay/Sacramento-San Joaquin Delta, and the Delta's water delivery system must be managed in a much more efficient manner.</p>		
<p>6500 WEST AVENUE N • PALMDALE, CALIFORNIA 93551 (661) 943-3201 • FAX (661) 943-3204</p>		

AVEKWA
-1

February 1, 2006
Mr. Lester Snow, Director
Department of Water Resources

FEB 09 2006 00171

The 2000 CalFed Bay-Delta Program, initiated to manage the Bay-Delta, was supported by environmental organizations, water agencies, business interests, farmers, and state and federal water and fish agencies. SDIP is the next step towards the goal of implementing long-term planning for the Bay-Delta's water resources and eco-system. SDIP will be responsible and balanced to better utilize and integrate existing water management infrastructure in the Bay-Delta. SDIP will improve California's water supply reliability, water quality and overall health of the Bay-Delta. SDIP will construct seasonal tidal gates to protect fish, improve water circulation and quality, and improve water deliveries for local farmers and the State Water Project.

AVEKWA-1

AVEK stands behind using California's water wisely, and believes that it is imperative that we have a more flexible water delivery system so that we can continue to accommodate growth. We strongly support SDIP and encourage advancement of this critically needed project.

Sincerely,



Russell E. Fuller
General Manager

cc: Honorable Governor Arnold Schwarzenegger
Mr. Ryan Brodderick, Director, California Department of Fish & Game
Mr. Mike Chrisman, Secretary, California Resources Agency
Mr. Joe Grindstaff, Director, California Bay-Delta Authority
Mr. Kirk Rodgers, Regional Director, Mid-Pacific Region, U.S. Bureau of Reclamation
Mr. Dan Skopec, Deputy Cabinet Secretary, Office of the Governor
Mr. Frank Aguiar, Cabinet Secretary, Office of the Governor
Ms. Susan Kennedy, Chief of Staff, Office of the Governor

Response to Comments

AVEKWA-1

The commenter's description of the project's benefits and support for the project are noted.